Tuan Syed Azahari bin Noh Shahabudin & Anor v Ming Holdings (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–962 OF 2002
DENIS ONG, TENGKU BAHARUDIN AND AZMEL JJCA
3 MAY 2007

Companies and Corporations — Shares — Financial assistance for purchase of company's shares — Whether s 133A of Companies Act 1965 applied

Contract — Void contract — Contrary to public policy — Agreement for Bumiputra shares be given to plaintiff as consideration for financial assistance — Whether agreement was contrary to public policy and illegal

The respondent ('the plaintiff') was owned by the Chan family where Datuk Chan Woot Khoon, Chan Koi Koon and Chan Fook Khoon were the directors. The plaintiff together with certain members of the Chan family own substantial but not majority shares in Palmco Holdings Bhd ('Palmco'), a public listed company. The first defendant, Tuan Syed Azahari bin Noh Shahabudin ('Syed') together with his family company ('the second defendant') and other members of the Syed family also owned shares of Palmco. Another bumiputra, Datuk Yusof Latif, his family company and members of his family also owned shares of Palmco. With the combined three shareholdings of the Chan family, the Syed family and the Datuk Yusof Latif family, Palmco was put under the control of the three families. On or about August 1984 Palmco declared bumiputra special rights issue to be taken solely among the bumiputra shareholders with a total issue of 9,640,000 shares of RM1 each. On the basis of the shares owned by the Syed family, they would be eligible to take a total of 3,158,959 shares. The Chan family agreed to assist the Syed family to take the bumiputra special rights issue. The nature of assistance offered by the Chan family was not only to source the financial institutions to obtain the financial loan for the purchase of the new shares but also agreed, if required, to pledge their Palmco shares to the banks. The plaintiff claimed that a total amount of 1,705,000 Palmco shares of the plaintiff was pledged to the banks as securities to assist the defendants to obtain the necessary financing of the new shares. When Malaysia experienced a recession in the late 1980s resulting in share prices tumbling down, the collateral or securities that had been pledged to the banks were force sold by the lending banks and these included the Palmco shares of the plaintiff that were used to assist the defendants to purchase the Bumiputra special rights issue shares.

In this action the plaintiff claimed from the first defendant the return of the 490,000 Palmco shares and from the second defendant the return of 1,215,000 Palmco shares. But because they were bumiputra shares which could not legally be transferred to the plaintiff the defendants agreed to hold the 500,000 shares in trust for the plaintiff. The plaintiff was agreeable to accept such consideration by the defendants for

pledging its Palmco shares to the banks. The defendants contended that such agreement was contrary to public policy and unlawful. As such it was illegal and unenforceable. The defendants also contended that the provision of the security provided by the plaintiff was contrary to s 133A(1)(b) of the Companies Act 1965. It was a void transaction by reason of the fact that at the material time the first defendant was a director of Palmco together with three other directors of the plaintiff and as such the plaintiff ought not to have provided any security in favour of the defendants for the loans. The defendants also filed a counter-claim seeking for a declaration that the deposit of the plaintiff's Palmco shares with the banks was contrary to the public policy and therefore illegal, void and unenforceable. The learned High Court judge ruled that when the plaintiff pledged its shares for the benefit of the defendants it was an implied term that the defendants would ensure that the shares would be returned to the plaintiff by the banks and if the shares were lost, the defendants would compensate the plaintiff for any loss incurred or would replace those shares. The learned judge allowed the plaintiff's claim against the defendant. The only issue was whether there was in fact an agreement made between the plaintiff and the defendants that 500,000 of the 3,158,959 bumiputra special rights issue shares allotted to the defendants were to be given to the plaintiff as the consideration for the plaintiff's assistance in pledging its Palmco shares in favour of the banks in order to enable the three defendants to obtain the bank loans to purchase the Bumiputra rights issue shares.

Held, allowing the appeal:

(1) The ruling of the learned judge in concluding that there was no such illegal transaction between the plaintiff and the defendants was totally against the weight of evidence. The plaintiff had agreed to give assistance to defendants to purchase the bumiputra special rights issue shares with certain consideration. And that consideration was the transfer of the defendants' bumiputra shares amounting to 500,000 shares out of the 3,158,959 special bumiputra issue shares allotted to the defendants and the defendants had agreed to hold those shares on trust for the plaintiff. Such consideration was clearly unlawful and void. It could not be enforced in law (see paras 30–31).

(2) As regard the defendant's contention that the plaintiff had contravened s 133A of the Companies Act 1965 having regard to the date of it coming into force on 1 February 1987 and the alleged transaction taking place in 1984, s 133A would not apply. There was no evidence forthcoming from the defendants that the coming into force of s 133A was during the currency of this legal action, contradicting such ruling. The defence must fail (see para 32).

[Bahasa Malaysia summary

Responden ('plaintif') dimiliki oleh keluarga Chan yang mana Datuk Chan Woot Khoon, Chan Koi Koon dan Chan Fook Khoon adalah pengarah. Plaintif bersama-sama dengan beberapa ahli keluarga Chan memiliki saham yang cukup banyak tetapi tidak majoriti dalam Palmco Holding Bhd ('Palmco') sebuah syarikat senarai awam. Defendan pertama, Tuan Syed Azahari bin Noh Shahabudin

('Syed') bersama-sama dengan syarikat keluarganya ('defendan kedua') dan ahli keluarga Syed yang lain juga memiliki saham Palmco. Bumiputra yang lain, Datuk Yusuf Latif, syarikat keluarganya dan ahli keluarganya juga memiliki saham Palmco. Dengan penyatuan tiga pemegang saham keluarga Chan, keluarga Syed dan keluarga Datuk Yusof Latif, Palmco diletakkan di bawah kawalan tiga keluarga ini. Pada atau kira-kira Ogos 1984 Palmco mengisytiharkan hak istimewa bumiputra dikeluarkan untuk diambil hanya dikalangan pemegang saham bumiputra dengan jumlah terbitan sebanyak 9,640,000 saham RM1 sesaham. Atas dasar saham yang dimiliki oleh keluarga Syed, mereka hanya boleh mengambil 3,158,959 saham keseluruhannya. Keluarga Chan bersetuju untuk membantu keluarga Syed untuk mengambil terbitan hak istimewa bumiputra. Cara pertolongan yang ditawarkan oleh keluarga Chan bukan hanya untuk menyumberkan institusi kewangan untuk mendapatkan pinjaman kewangan bagi membeli saham baru tetapi juga bersetuju, jika diperlukan, untuk mencagarkan saham Palmco mereka kepada bank. Plaintif menyatakan bahawa sejumlah 1,705,000 saham Palmco plaintif telah dicagarkan kepada bank sebagai jaminan bagi membantu defendan-defendan untuk mendapatkan kewangan yang diperlukan untuk saham baru. Apabila Malaysia menghadapi kemerosotan ekonomi pada lewat 1980an menyebabkan harga saham jatuh menjunam. Cagaran atau jaminan yang dicagarkan kepada bank telah terpaksa dijual oleh bank peminjam dan ini termasuk saham Palmco plaintif yang digunakan untuk membantu defendan-defendan untuk membeli terbitan saham hak istimewa bumiputra.

Dalam tindakan ini plaintif menuntut daripada defendan pertama pemulangan 490,000 saham Palmco dan daripada defendan kedua pemulangan 1,215,000 saham Palmco. Tetapi oleh kerana ianya adalah saham bumiputra yang tidak boleh dengan sahnya dipindahkam kepada plaintif defendan bersetuju untuk memegang 500,000 saham secara amanah bagi plaintif. Plaintif telah bersetuju untuk menerima balasan daripada defendan-defendan untuk mencagarkan saham Palmconya kepada bank. Defendan mengatakan bahawa perjanjian tersebut adalah bersalahan dengan polisi awam dan tidak sah. Oleh itu ianya adalah menyalahi undang-undang dan tidak boleh dikuatkuasakan. Defendan juga mengatakan bahawa peruntukan jaminan yang disediakan oleh plaintif adalah bertentangan dengan s 133A(1)(b) Akta Syarikat 1965. Ianya adalah transaksi yang tidak sah dengan sebab bahawa pada masa yang material defendan pertama adalah pengarah Palmco bersama-sama dengan tiga lagi pengarah plaintif dan oleh itu plaintif seharusnya tidak menyediakan apa-apa jaminan bagi pihak defendan-defendan bagi pinjaman. Defendan juga memfailkan tuntutan balas memohon deklarasi bahawa deposit saham Palmco plaintif dengan bank adalah bertentangan dengan polisi awam dan oleh itu adalah tidak sah, terbatal dan tidak boleh dikuatkuasakan. Hakim mahkamah tinggi yang bijaksana memutuskan bahawa apabila plaintif mencagarkan saham-sahamnya untuk faedah defendan-defendan ianya adalah terma tersirat bahawa defendan-defendan akan memastikan bahawa saham-saham akan dikembalikan kepada plaintif oleh bank dan jika saham-saham hilang, defendan perlu mengganti rugi plaintif untuk kerugian yang dialami atau menggantikan saham-saham tersebut. Hakim yang bijaksana membenarkan tuntutan plaintif terhadap defendan. Satu-satunya isu adalah sama ada terdapatnya dalam fakta satu perjanjian yang dibuat di antara plaintif dan defendan-defendan bahawa 500,000 daripada 3,158,959 saham terbitan hak istimewa bumiputra yang diperuntukkan kepada defendan diserahkan kepada

plaintif sebagai balasan untuk bantuan plaintif dalam mencagarkan saham Palmconya bagi pihak bank bagi membolehkan ketiga-tiga defendan mendapatkan pinjaman bank untuk membeli terbitan saham hak bumiputra.

Diputuskan, membenarkan rayuan perayu:

(1) Keputusan hakim yang bijaksana menyimpulkan bahawa tidak terdapatnya transaksi yang menyalahi undang-undang di antara plaintif dan defendan-defendan adalah keseluruhannya menyalahi keberatan bukti. Plaintif telah bersetuju untuk memberikan bantuan kepada defendan-defendan untuk membeli terbitan saham hak istimewa bumiputra dengan balasan tertentu. Dan balasan tersebut adalah pemindahan saham bumiputra defendan berjumlah 500,000 saham daripada 3,158,959 terbutan saham istimewa bumiputra yang diperuntukkan kepada defendan dan defendan telah bersetuju untuk memegang saham-saham tersebut secara amanah bagi pihak plaintif. Balasan tersebut secara jelasnya adalah tidak sah dan terbatal. Ianya tidak boleh dikuatkuasakan dalam undang-undang (lihat perenggan 30–31).

(2) Berkenaan dengan pengataan defendan bahawa plaintif telah menyalahi s 133A Akta Syarikat 1965 mengambil kira tarikh penguatkuasaannya pada 1 Februari 1987 dan transaksi yang didakwa berlaku pada 1984, s 133A tidak terpakai. Tidak terdapatnya bukti yang diberikan oleh defendan bahawa penguatkuasaan s 133A adalah ketika berlangsungnya tindakan undang-undang ini, bertentangan keputusan tersebut, pembelaan semestinya gagal (lihat perenggan 32).]

Notes

For cases on financial assistance for purchase of company's shares, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 728–733.

For a case on contrary to public policy, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4888.

Cases referred to

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Report 403 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (folld)

Legislation referred to

Companies Act 1965 s 133A(1)(b)

Appeal from: Civil Suit No 22–263 of 1990 (High Court, Pualu Pinang)

Surinder Singh Gill (Ong & Manecksha) for the appellants.
Tan Swee Cheng (Cheong Wai Meng & Van Buerle) for the respondent.

Azmel JCA (now FCJ, delivering judgment of the court):

[1] There are factual similarities between this appeal and the Civil Appeal No P–02–964 of 2002 involving the same plaintiff but the defendants in the latter

case are Datuk Hj Mohd Yusof Latif ('Datuk Yusof Latif') and his family company. Since the issues in respect of the two appeals are the same the parties in the Civil Appeal No P–02–964 of 2002 have agreed, as they did in the court below, to be bound by whatever decision given by this court on this appeal.

BACKGROUND FACTS

[2] The plaintiff (respondent in this appeal) is owned by the Chan family where Datuk Chan Woot Khoon, Chan Koi Koon and Chan Fook Khoon are the directors. The plaintiff together with certain members of the Chan family own substantial but not majority shares in Palmco Holdings Bhd ('Palmco') a public listed company. The first defendant, Tuan Syed Azahari bin Noh Shahabudin ('Syed') together with his family company (second defendant) and other members of the Syed family also owned shares of Palmco. Another bumiputra, Datuk Yusof Latif, his family company and members of his family also owned shares of Palmco. With the combined shareholdings of the Chan family, the Syed family and the Datuk Yusof Latif family, Palmco was put under the control of the three families. When Palmco was established in 1982 the directors were Datuk Chan Woot Khoon, Chan Koi Khoon, Syed (first defendant) and Datuk Yusof Latif. They continued to be directors up to 1989.

[3] In August 1984 Palmco declared a rights issue of three shares for every five shares held to its shareholders. There was a total of 53,010,000 new rights issue shares of RM1 to be taken up.

[4] Round and about the same time Palmco also declared bumiputra special rights issue to be taken solely among the bumiputra shareholders with a total issue of 9,640,000 shares of RM1 each. On the basis of the shares owned by the Syed family, they would be eligible to take a total of 3,158,959 shares.

[5] It is not in dispute that the relationship between the Chan family and the Syed family as well as Datuk Yusof Latif family was very close indeed with complete trust and cooperation among the three families. Hence the appointment of the directors of Palmco from among members of the three families. It must be quite obvious that consequential to the declaration of the rights issue as well as the special rights issue for the bumiputra shareholders the three families would have to take up all the rights issue and the special right issue for bumiputra shareholders if they wished to continue to be in control of Palmco. So in the meetings held among the members of the three families it was agreed that all the entitlement of the rights issue and the bumiputra special rights issue would have to be taken up. Status quo had to be maintained. Otherwise other parties might take over the control of Palmco. It was mainly because of ensuring continued control of Palmco coupled with the prevailing good relationship between the Chan family and the Syed family that the Chan family had agreed to assist the Syed family to take the bumiputra special rights issue. The nature of assistance offered by the Chan family was not only to source the financial institutions to obtain the financial loan for the purchase of the new shares but also agreed, if required, to pledge their Palmco shares to the banks. The plaintiff claimed

that a total amount of 1,705,000 Palmco shares of the plaintiff was pledged to the banks as securities to assist the defendants to obtain the necessary financing of the said new shares.

[6] During the time of the rights issue the market price of Palmco shares was RM1.80 per share. The defendants could have sold the shares after their issue and would have obtained substantial profit but decided not to do so. It goes to say that if any member of the three families were to dispose off their shares then the percentage of their shareholding vis-à-vis the shareholding of other shareholders would be diluted with a possibility that they would no longer be in control of Palmco. So no sale of shares by members of the three families took place until Malaysia experienced a recession in the late 80s resulting in the tumbling down of the price of shares. Consequently the collateral or securities that had been pledged to the banks were force sold by the lending banks and these included the Palmco shares of the plaintiff that were used to assist the defendants to purchase the bumiputra special rights issue shares.

[7] In this action the plaintiff claimed from the first defendant the return of the 490,000 Palmco shares and from the second defendant the return of 1,215,000 Palmco shares.

PLAINTIFF'S CASE

[8] Chan Kai Hoon (PW1) a director of the plaintiff gave evidence on behalf of the plaintiff contending that it was at the request of the defendants that the plaintiff pledged its Palmco shares amounting to a total of 1,705,000 shares to the banks to assist the defendants to obtain the loan for their bumiputra rights issue. Because the defendants failed to repay the loans with the respective banks, the banks force-sold the plaintiff's Palmco shares. In the premise, the plaintiff lost all its Palmco shares. Hence the plaintiff claimed from the defendants for the loss of all its Palmco shares.

DEFENDANTS' CASE

[9] At the hearing Syed (the first defendant) contended that it was agreed at the meeting among the Palmco directors that the Chan, Syed and Datuk Yusof Latif families cooperate and assist each other to take up their entitlements of the rights issue and the bumiputra special rights issue in order to continue to be in control of Palmco. Towards this objective the plaintiff agreed to obtain bank loans and pledge its Palmco shares as collateral to the banks in order to purchase not only the rights issue shares but also the bumiputra special rights issue shares and as consideration for assisting the defendants to take up the bumiputra rights issue the defendant would transfer 500,000 of the 3,158,959 bumiputra special issue shares to the plaintiff. But because they were bumiputra shares which could not legally be transferred to the plaintiff the defendants agreed to hold the said 500,000 shares in trust for the plaintiff. The plaintiff was agreeable to accept such consideration by the defendants for pledging its Palmco shares to the banks.

[10] The defendants contended that such agreement was contrary to public policy and unlawful. As such it was illegal and unenforceable.

[11] The defendants also contended that the provision of the security provided by the plaintiff is contrary to s 133A(1)(b) of the Companies Act 1965. It was a void transaction by reason of the fact that at the material time the first defendant was a director of Palmco together with three other directors of the plaintiff and as such the plaintiff ought not to have provided any security in favour of the defendants for the said loans.

[12] The defendants also filed a counterclaim seeking for a declaration that the deposit of the plaintiff's Palmco shares with the banks is contrary to the public policy and therefore illegal, void and unenforceable.

FINDINGS OF THE HIGH COURT

[13] The learned High Court judge ruled that when the plaintiff pledged its shares for the benefit of the defendants it is an implied term that the defendants would ensure that the shares would be returned to the plaintiff by the banks and if the shares were lost, the defendants would compensate the plaintiff for any loss incurred or would replace those shares. The learned judge allowed the plaintiff's claim against the defendant.

[14] The defendant's defence that there was an agreement that the defendant would give 500,000 shares of the 3,158,959 bumiputra special issue shares of Palmco as consideration for the assistance given by the plaintiff pledging its Palmco shares in favour of the banks was not acceptable by the learned judge. His reasons for not accepting the defendants' story are as follows:

(1) The defendants did not adduce any documentary evidence to substantiate their allegations, and relied only on oral evidence. The defendant had failed to produce some account to show the existence of a Pool Account alleged to exist kept by the Chan family;

(2) During cross examination of PW1 the defence counsel put to PW1 that Hooi Kee Sum the financial controller of Palmco had full knowledge of the illegal transaction. Because the defendants failed to call Hooi Kee Sum to support their allegation the learned judge made conclusion that there was no such illegal arrangement;

(3) On DW1's contention that he could have sold their bumiputra special rights issue shares and would have made a reasonable profit but chose not to do so because of the arrangement among the directors of Palmco due to their close relationship with the Chan family it was totally rejected by the learned judge as he was of the view that the first defendant was a businessman and his primary objective was to make profit. Furthermore since the percentage of the defendants' shares was only about 2% of the total paid-up capital of Palmco, the defendants' shares could not have made any impact.

(4) Syed (DW1) was also unable to specify how much of the 500,000 bumiputra shares were to be allotted by each of the two defendants to plaintiff especially when in their defence it was pleaded that the defendants and the first defendant's wife had jointly taken up 3,158,959 shares. Because of this inability the learned judge made a conclusion that the defence story could not be believed.

FINDING OF THIS COURT

[15] It is to be observed that this appeal is based purely on facts. The only issue is whether there was in fact an agreement made between the plaintiff and the defendants that 500,000 of the 3,158,959 bumiputra special rights issue shares allotted to the defendants were to be given to the Plaintiff as the consideration for the plaintiff's assistance in pledging its Palmco shares in favour of the banks in order to enable the defendants to obtain the bank loans to purchase the said bumiputra rights issue shares.

[16] The principle to be followed by appellate court in dealing with appeals purely on issues of facts are well established in the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 where Gopal Sri Ram JCA said at pp 398–399:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. *But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.* (emphasis added).

His Lordship went on to say at p 399:

> In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscont Simon (who was in the majority) in *The 'Eurymedon'* [1942] 73 Llyod LR217:
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> > The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which we hasten to add, is not the case here]. I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us to overthrowing what has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view — in these mundane happenings there is no more conclusive arguments than non est credendum quia impossible. If the impeached decision were shown to be unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*
>
> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

[17] In the same case Mahavev Shanker JCA quoted the dissenting speech of Lord Pearce in the case of *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Report 403 at p 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of a wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right,

A namely, the weighing of the respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matter are questions of degree.

B

[18] As we have stated above the issue in this appeal is purely on facts. The learned judge had quite rightly identified the issue to be decided ie whether there was an agreement made between the plaintiff and the defendants that 500,000 of the 3,158,959 bumiputra special rights issue were to be considered sold to the plaintiff but to be held on trust by the defendants on the plaintiff's behalf. If such agreement C did exist there should be no doubts that such an agreement is contrary to public policy and is therefore illegal and unenforceable because such transaction can be regarded as cheating and misleading the Government and the public concerning the actual amount of equity owned by bumiputra shareholders in Palmco.

D **[19]** We propose to examine the reasons given by the learned judge in arriving at his conclusion that there was no such agreement as alleged by the defendants.

[20] Firstly, the learned judge said that the DW1's contention was based only on oral evidence. It was not supported by any documentary evidence. In our view no E sensible person would want to commit to writing a transaction which is illegal and unlawful unless the parties are completely ignorant of the law. Such illegal transaction would expose them to criminal actions. The plaintiff's directors with whom DW1 had closely associated were very experienced businessmen and corporate figures and undoubtedly were very familiar with the relevant commercial laws. It would be naïve to think that they were ignorant of such laws. To commit such type of illegal F agreement in writing would be just like putting their necks on the chopping block.

[21] The learned judge then went on to give adverse inference against the defendants for their failure to produce the so-called 'Pool Account'. However when perusing the written statement of DW1 (the first defendant) the Q & A for Nos 23 G to 30 which deal with the subject of Pool Agreement, we noticed that they had been deleted. On our query as to why they were deleted at the court below, the counsel for the defendants (appellants in this appeal) said they were deleted at the insistence of the learned judge who threatened that if that part of the statement was not withdrawn he would lodge a report to the relevant authorities. Because of such H insistence by the learned judge that portion of DW1's statement was eventually deleted. Such being the scenario how then could DW1 bring evidence of the Pool Account when the learned judge himself insisted on the deletion of the evidence pertaining to the Pool Agreement.

I **[22]** As recorded in the notes of evidence it would appear that DW1 was initially very reluctant to delete those partof his evidence, based on the followings:

Q: See Q/A 23, 24, 25 and 26. You are aware you are making defamatory statements against my client and his brother, Dato' Robert Chan.

A: I'm stating a fact.

Q: I put it to you that there is no pool account or football pool account as alleged by you? **A**

A: I don't agree. I can produce some accounts that will show the existence of those accounts.

Q: But it is not before this court? **B**

A: Not at the moment.

Q: Are you confessing to this court that you and Datuk Latif participated insider trading in Palmco shares and thereby committed a criminal offence?

C

[23] Before DW1 could give his answer to that question the court made the insistence to delete that part of DW1's statement. Hence the hearing was adjourned to another day (8 February 2002). And at the continued hearing on 8 February 2002 it was recorded, *By consent, counsel for the defendants wishes to delete Q/A 23, 24, 25, 26, 27(1) and (iv) and (v), 28, 29 and 30*. Before us the counsel for the appellants/defendants informed us that he was forced by the learned judge to delete those parts of DW1's statement. Such information by the appellant's counsel was not denied by the respondent's counsel. We took it that it must be true. **D**

[24] Two things can be inferred from this episode. Firstly, the existence of such 'Pool Agreement' could be true having regard to the fact that DW1 was ever willing to expose himself to a criminal action. In answer to a question by the plaintiff's counsel, DW1 said 'I am stating a fact' and 'I can produce some accounts that will show the existence of those accounts'. Secondly, in the light of the court ruling that the evidence on the 'Pool Account' be deleted it would be quite obvious to us that the opportunity for DW1 to produce those accounts had been directly deprived by the order of the learned judge. Based on DW1's answers under cross examination and the subsequent ruling by the learned judge it is highly improper for the learned judge to conclude that DW1 could not produce that piece of documentary proof. The learned judge had also seriously misdirected himself when he asked that part of DW1's statement to be deleted as that would form a relevant fact to the issue in hand. He had further made a wrong conclusion when he drew an adverse inference for DW1's failure to produce documentary evidence on the existence of the Pool Account after insisting that such evidence be deleted. **E** **F** **G**

[25] To show that wrongdoings are not alien to the parties in this suit, PW1 (Chan Koi Khoon), in his written statement, in answer to Q 29 did admit that his brother Datuk Robert Chan Woot Khoon together with DW1 and Datuk Yusof Latif had illegally made use of the names of their secretaries to obtain loans from Credit Leasing Corporation Sdn Bhd, a wholly owned subsidiary of Palmco, an act contravening s 133 of the Companies Act. From the written statement of PW1 it can be inferred that a senior member of the plaintiff, Datuk Chan had been involved in illegal transaction together with DW1 and Datuk Yusof Latif. In other words directors of the plaintiff would not absolutely distant themselves from committing illegal transactions. This is a material fact which the learned judge had omitted to consider in determining whether such illegal agreement as alleged by the defendants did exist. **H** **I**

A **[26]** As to the second reason, the learned judge made adverse inference on the failure of the defendants to call Hooi Kee Sum to give evidence to confirm his knowledge of the illegal transaction. In our view it would be utterly suicidal for the defendants to call Hoe Kee Sum to support DW1's contention knowing fully well that Hooi worked for the plaintiff's directors and he would definitely give evidence B against the defendants where the nature of his answer would be purely oral and not documentary. We feel that this failure should not have been used by the learned judge as a valid ground to arrive at the conclusion which he did.

[27] Thirdly, the learned judge rejected DW1's explaination that he did not sell his C bumiputra special rights issue shares immediately after the allotment in view of his willingness to comply with the arrangement among the Palmco directors on the ground that the judge had concluded DW1 was a businessman with primary objective of maximizing his profit. In our view that action taken by the defendants not to sell those shares was that of a very reasonable and considerate person who had D received such favours and assistance from the plaintiff and was prepared to float and sink together with the Chan family. To reject DW1's explaination would be against the weight of evidence. It must not be forgotten that on the basis of their combined shares the three families had been able to continuously control Palmco from 1982 to 1989. This could only be possible if none of them were not to sell their respective shares. This was what the Syed family had during those years faithfully conformed E until the recession stepped in in 1989 when through no fault of the defendants the position had changed. The idea of selling their shares had never been in the mind of the defendants whose shares though comparatively small were important to supplement the Chan family's shares to enable them to be in control of Palmco. It must be stressed that on the basis of the Chan family's shares only, they would not F be able to be in control of Palmco. Obviously the learned judge had seriously omitted to consider the important impact of the combined shares of the Syed family together with those of Datuk Yusof's family to enable the Chan family to be in control of Palmco. Hence the sale of the shares of the Syed family would certainly defeat such purpose. It would be highly undesired.

G **[28]** Finally, what we consider to be the most glaring fact which the learned judge had seriously omitted to consider in determining whether the plaintiff's claim was genuine or otherwise, is the fact that the plaintiff took almost six years before asking for the repayment of its loan from the defendants. We are dealing with shares of Palmco amounting to 1,705,000 each having a market value of RM1.80 at the H relevant time and if converted into money would amount to more than RM3m. Would seasoned businessmen like the directors of the plaintiff allow such amount of money be kept completely idle for a period of six years? One cannot ignore the fact that such dealing in shares involves certain risks and the amount was huge. Any fair-minded person would definitely want that amount of money to be invested, I in order to generate certain income. In our view it would be very naïve to conclude that the plaintiff, with seasoned businessmen as directors, had agreed to loan such huge amount of shares to the defendants without any form of consideration whatsoever. It is something which we find it very difficult to accept and could not have happened in the circumstance of this case. There must definitely be some form of consideration given for such generous favour involving great risk. Before us only

one form of consideration was contended to have been agreed as stated by the defendant which we consider to be quite probable. We are unable to agree with the learned judge when he ruled that the loan by the plaintiff to the defendants was without any consideration whatsoever. In our view, businessmen like the directors of the plaintiff, would not have agreed to allow such amount of shares to be lent to the defendants thereby exposing such shares to risk without any form of consideration. It is something which does not happen in the business world. Based on the facts of this case we conclude that the plaintiff was prepared to loan its shares to the defendant to purchase the bumiputra rights issue shares firstly because that would ensure the Chan family continuous control of Palmco and at the same time derive certain benefit from such transaction through the unlawful means having 500,000 bumiputra shares of the defendants with the understanding that the Syed family would hold those shares in trust for the Chan family in return for having received such generous favour. But such arrangements are clearly unlawful as they are completely against public policy. The Government had put serious efforts to ensure bumiputra participation in the business sector achieves certain ratio. The arrangements in this case had obviously defeated the purpose and objective of the Government policy. It is cheating the Government and the public at large and as such it should be completely discouraged if not punished. It is therefore the duty of this court to ensure that such unlawful act be totally discouraged by declaring it to be unenforceable.

[29] As to the fourth reason, the learned judge made a material issue on the inability of DW1 to specify how much of the 500,000 shares to be allotted to the plaintiff by each of the two defendants. Bearing in mind the family relationship between the first and the second defendants we completely fail to see why such allotment become necessary. The second defendant is DW1's (defendant No 1) family company. We fail to see any real need to specify how much each of the two defendants would have to allot their respective portions for the return of the 500,000 to the plaintiff. In what manner it is to be allotted should not be a concern of the plaintiff so long as it receives the 500,000 shares. Here again the learned judge had committed a misdirection when he ruled that the defendant's failure to make the allotment was a ground to arrive at the conclusion which he did.

[30] It is our view that the ruling of the learned judge in concluding that there was no such illegal transaction between the plaintiff and the defendants was totally against the weight of evidence and we are unable to agree with him.

[31] In the light of the circumstances mentioned above we arrived at the conclusion that the plaintiff had agreed to give assistance to defendants to purchase the bumiputra special rights issue shares with certain consideration. And that consideration was the transfer of the defendants' bumiputra shares amounting to 500,000 shares out of the 3,158,959 special bumiputra issue shares allotted to the defendants and the defendants had agreed to hold those shares on trust for the plaintiff. Such consideration is clearly unlawful and void. It cannot be enforced in law.

[32] As regard the defendant's contention that the plaintiff had contravened s 133A of the Companies Act 1965 having regard to the date of it coming into force on 1 February 1987 and the alleged transaction taking place in 1984 we would agree with the learned judge that s 133A would not apply. There was no evidence forthcoming from the defendants that the coming into force of s 133A was during the currency of this legal action, contradicting such ruling. This defence must fail.

[33] In respect of the defendants' counter-claim we agree with the learned judge that it is exactly the same as the defendants' line of defence without any additional fact. It had no merits whatsoever.

[34] We therefore allow the appeal and reverse the decision of the High Court on the basis of our ruling on the earlier defence. We order that costs of this appeal and in the court below to be paid by the plaintiff to the defendants. Deposit is to be refunded.

[35] My learned brothers, Denis Ong and Tengku Baharudin Shah JJCA have seen this judgment in the draft and have expressed their agreement with it.

Appeal allowed.

Reported by Loo Lai Mee